IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 07-12-2007

CORAM:

THE HONOURABLE MR.JUSTICE K.RAVIRAJA PANDIAN

AND

THE HONOURABLE MRS.JUSTICE CHITRA VENKATARAMAN

O.S.A.NO.285 OF 2003

M/s.Tamil Nadu Small Industries
Corporation represented by its
General Manager .. Appellants

Versus

1. M/s.Southern Railway represented
   by its Chief Electrical Engineer
   Railway Electrification, Egmore
   Chennai - 600 008

2. Mr.R.Gopinathan Nair
   Chief Engineer (Construction)
   Southern Railway, Egmore
   Chennai - 600 008

3. Smt.Vijayakanth
   Senior Divisional Accounts Officer
   Southern Railway, Egmore,
   Chennai - 600 008. .. Respondents

For Appellant :: Mr.G.R.Lakshmanan
For Respondents :: Mr.V.G.Sureshkumar

Prayer: Original Side Appeal No.285 of 2003 preferred against the order made in O.P.No.605 of 1991 dated 30.4.2002 passed by the single Judge.

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JUDGMENT

K.RAVIRAJA PANDIAN,J.

This appeal is filed by the Tamil Nadu Small Industries Corporation represented by its General Manager against the order dated 30.4.2002 passed by the learned Single Judge in O.P.No.605 of 1991.

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2. The O.P. was filed by the appellant against the respondents under Sections 14, 17 and 30 of the Arbitration Act, 1940 seeking for the reliefs of setting aside the award of rejecting a portion of the claim made by the appellant for a sum ofRs.2,24,083.50ps, to direct the respondent to pay the appellant Corporation the interest claimed by the appellant and to direct respondents 2 and 3 to file the award dated 2.4.1990 passed by them into Court.

3. The facts required for disposal of the appeal are as follows:

The appellant entered into a structural contract with the first respondent for the contracted amount of Rs.14.55 lakhs to be completed within a period of eighteen months. On 22.11.1997 the agreement was entered into. As number of difficulties experienced, the work could not be completed within the stipulated period of eighteen months. At the instance of the appellant, the period was extended thrice. The work was completed on 31.3.1990 prior to the expiry of the last extended period. The appellant submitted a bill for a sum of Rs.8,54,850.54ps. However, the first respondent demanded certain extra expenditure incurred by it besides calling upon the appellant to pay the loss sustained because of the delayed completion of work. Thus a dispute arose between the parties. The appellant claimed a sum of Rs.8,54,851/- towards work done by it and a sum of Rs.13,57,000/- towards interest on Rs.8,54,851/- at 18% from the date of award till the date of payment of the said amount. The arbitrator has awarded a sum of Rs.6,29,433/- out of the claim of Rs.8,53,521/- towards work done by the appellant, however negatived the claim of interest sought for by the appellant.

4. The appellant herein, as stated in the summation of facts, filed O.P. claiming the balance sum of Rs.2,24,083.50ps in respect of the first claim and interest over it at the rate of 18 percent. The learned single Judge after taking into consideration of the arguments advanced and material made available before him dismissed the Original Petition. The correctness of the same is put in issue before us in this appeal.

5. Mr.G.R.Lakshmanan, learned counsel appearing for the appellant has submitted that the amount as awarded by the arbitrator towards work done in a sum of Rs.6,29,433/- has already been paid over to the appellant and in respect of balance amount it is not seriously disputed by the appellant. Thus, the dispute in this case is as to the entitlement of the appellant for interest. He relied on Section 28 of the Indian Contract Act, 1872 to contend that an agreement is void to the extent which restricts a party from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus

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enforce his right or which extinguishes the rights of any party thereto, or discharges any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights. He further contends that the appellant is entitled to interest notwithstanding the fact that there is prohibition in the terms of the agreement. He further contended that the appellant was not equal in the bargaining capacity. Hence, the contract was entered into with the prohibition clause for payment of interest. He relied on the decisions of the Supreme Court in CENTRAL INLAND WATER TRANSPORT CORPORATION LIMITED VS. BROJO NATH, (AIR 1986 SC 1571), SREE KAMATCHI AMMAN CONSTRUCTIONS VS. THE DIVISIONAL RAILWAY MANAGER-WORKS, PALGHAT DIVISION, SOUTHERN RAILWAY, PALGHAT, KERALA, 2007(5) CTC 17 and EXECUTIVE ENGINEER, DHENKANAL MINOR IRRIGATION DIVISION, ORISSA AND OTHERS VS. N.C.BUDHARAJ (2001) 2 SCC 721 to contend that the order of the arbitrators as well as the learned single Judge non-suiting the appellant for the relief of interest are not sustainable.

6. However, the learned counsel appearing for the first respondent Railways has argued for sustaining the award as well as the order passed by the learned single Judge.

7. We heard the learned counsel on either side and perused the materials on record.

8. The arbitrators as well as the learned single Judge have negatived the claim of interest on the ground that the General Conditions of Contract for Civil Engineering Works of Southern Railway, which is indisputably applicable to the contract under consideration and specifically stipulated that no interest would be payable upon the earnest money or the security deposit or amounts payable to the contractor under the contract. In view of prohibition clause contained in the agreement, the appellant could not claim interest.

9. We are of the view that Section 28 of the Contract Act or for that matter Explanation 2 to that Section with which reliance has been made by the learned counsel for the appellant cannot be made applicable to the facts of the present case, because the said Section would be applicable only in respect of agreements in restraint of legal proceedings as it is manifest from the marginal heading of the said Section, which reads "Agreements in restraint of legal proceedings, void". Section 23 of the Contract Act prohibits the agreements, which have, for their object of restraining of independence from enjoying the fundamental right of resorting to Court of law for redressal of relief. The agreement did not restrain the Contractor from taking legal recourse or compelled him to have his right to take legal remedy. The dispute in the present case is based on agreement entered into between the parties consciously accepting

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to the terms and conditions contained therein. The consideration agreed upon for the work done by the appellant and the entitlement or otherwise of interest over the consideration are all contractual pare and simple and based on the terms mutually agreed by the parties. The dispute is with regard to the contractual terms contained in the agreement and not with regard to restrainment of legal proceedings. The appellant has not been compelled or coerced to enter into the agreement forbearing him from enforcing his legal right claiming interest. So is the 2nd Explanation appended to the Section. Hence the contention is rejected.

10. The case of CENTRAL INLAND WATER TRANSPORT CORPORATION LIMITED VS. BROJO NATH, (AIR 1986 SC 1571) relied on by the learned counsel for the appellant, the appellant Company was carrying on the business of maintenance and running of river services entered into a scheme of Arrangement with the Central Inland Water Transport Corporation Limited, a Government Company owned by Central Government and two State Governments. The Scheme was approved of, and the company was dissolved by the order of the High Court. The Officers of the Company had no real choice when they accepted the job with the Corporation as, in the alternative, they would have received a meagre sum by way of compensation and would have been required to search for alternative jobs. They had no real choice when the rules were framed by the corporation for the officers as refusal to accept the rules would have resulted in termination of their services. A sub-clause in a rule provided for termination of services of the officers by giving three months' notice. The clause in the rule was struck down by the High Court and approved by the Supreme Court by observing that considering the inequality in the bargaining power of the parties the clause in the contract of employment was void under Section 23 of the Contract Act as opposed to public policy, besides being ultra vires Article 14.

11. The said decision was based on totally different facts and rest on totally different circumstances. A service rule framed by a State to the detriment of the employee could not at any stretch of imagination be regarded and equated with terms of the voluntary agreement entered into by the parties in commercial contract. If the terms of the contract were not agreeable to the appellant, the appellant would have refrained from entering into the agreement. It is not the case of the appellant that if he did not enter into the agreement he would be blacklisted once and for all thereby driven out of his avocation. At no stretch of imagination, the above judgment of the Supreme Court is made applicable to the facts of the present case.

12. In the case of SREE KAMATCHI AMMAN CONSTRUCTIONS VS. THE DIVISIONAL RAILWAY MANAGER-WORKS, PALGHAT DIVISION, SOUTHERN RAILWAY, PALGHAT, KERALA, 2007(5) CTC 17, this Court has

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considered the case of Railways contract under the provisions of the Arbitration and Conciliation Act, 1996, wherein it was held thus:

> "68.In the instant case before us, Arbitrators have found that the claimant is not entitled to interest for the pre-reference period. If we are to embark upon enquiry as to the applicability of Cl.16 (2) GCC, we would be required to probe into the matter in which the Arbitrators have construed the contract. In our opinion, while the Arbitrators have concluded not to award interest, that conclusion cannot be interfered with. Even assuming, if such conclusion not awarding interest is erroneous, it could only be an error within the jurisdiction of the Arbitrators and the same cannot be interfered with. If we do so, we would be exercising jurisdiction beyond that is vested under Section 34 of AC Act, 1996."

The above observation of the Judgment instead of supporting the case of the appellant rather strengthen the case of the respondents.

13. The other judgment of the Supreme Court relied on by the learned counsel for the appellant is EXECUTIVE ENGINEER, DHENKANAL MINOR IRRIGATION DIVISION, ORISSA AND OTHERS VS. N.C.BUDHARAJ (2001) 2 SCC 721, the Supreme Court held as follows:

> "25. .... By agreeing to have settlement of disputes through arbitration, the party concerned must be understood to have only opted for a different forum of adjudication with less cumbersome procedure, delay and expense and not to abandon all or any of his substantive rights under the various laws in force, according to which only even the Arbitrator is obliged to adjudicate the claims referred to him. As long as there is nothing in the arbitration agreement to exclude the jurisdiction of the Arbitrator to entertain a claim for interest on the amounts due under the contract, or any prohibition to claim interest on the amounts due and become payable under the contract, the jurisdiction of the Arbitrator to consider and award interest in respect of all periods subject only to Section 29 of the Arbitration Act, 1940 and that too the powers of the Court thereunder, has to be upheld.
>
> .....
>
> 26. For all the reasons stated above, we answer the reference by holding that the Arbitrator appointed with or without the

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> intervention of the court, has jurisdiction to award interest, on the sums found due and payable, for the pre-reference period, in the absence of any specific stipulation or prohibition in the contract to claim or grant any such interest. The decision in Jenas case [1988 (1) SCC 418] taking a contra view does not lay down the correct position and stands overruled, prospectively, ..."
>
> (underline supplied)

The Apex Court in the above judgment held that the Arbitrator has power to award interest so long as there was prohibition in the agreement for grant of interest.

14. Section 30 of the Act X of 1940 was restrictive in its operation. The Section mandated that the award of the Arbitrator shall not be set aside excepting for the reasons that the Arbitrator has misdirected himself or the award has been made after supersession of the Arbitration or the proceedings becoming invalid. It is well settled that the Arbitrator being a creature of the agreement between the parties has to operate within the four corners of the agreement and if he ignores the specific terms of the contract it would be a question of jurisdictional error falling within the ambit of legal misconduct. The arbitrator cannot award the claim contrary to the unambiguous and express terms of the contract. (vide FOOD CORPORATION OF INDIA VS. CHANDU CONSTRUCTION AND ANOTHER, (2007(4) MLJ 73 (SC)).

15. For the reasoning aforesaid and in the light of the exposition of law by the Constitution Bench of the Supreme Court reported in (2001) 2 SCC 721, we are not able to concur with the contention of the appellant. The Original Side Appeal is dismissed. However, there is no order as to costs.

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To

The Sub Asst.Registrar
Original Side
High Court
Madras.

+ 1 cc to mr. V. G. Sureshkumar, Advocate SR No. 72555
+ 1 cc to Mr. G. P. Lakshmanan, Advocate SR No. 72702

LA(CO)
SR/7.1.2008

Judgment in
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